

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

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**MOTION TO STRIKE PORTIONS OF STATE’S EXHIBIT 3351**

The Court admitted into evidence State’s exhibit 3351 but, because this is a lengthy document that was proffered in its entirety, the Court allowed Defendants an opportunity to identify any portions which Defendants believe should be stricken. *See, e.g.*, 9/30/09 Trial Trans. at 409:25 – 410:5 (“THE COURT: Let’s step back just a second. Are there reports here from third parties that need to be excised? MR. JORGENSEN: May we have the opportunity to look at it overnight, Your Honor, and if we want something excised, come back to you, as we were doing before? I doubt we will. THE COURT: I think that makes some sense.”).

Defendants respectfully move the Court to exclude portions of the State’s exhibit 3351, which is the *Illinois River Cooperative River BasinBasin (sic) Resource Base Report* (March 1992) (“Cooperative Report”) prepared under the auspices of the United States Department of Agriculture, the Soil Conservation Service and the Forest Service, in cooperation with the Arkansas Soil and Water Conservation Commission and Oklahoma Conservation Commission. Without waiving their general objections to this document, Defendants respectfully seek the exclusion of the following selected portions.

## LEGAL STANDARD

The relevant legal standards are set out in *Defendants' Bench Memorandum Regarding The Public Records Exception To The Hearsay Rule Pursuant To Federal Rule Of Evidence 803(8)(C)*, Dkt. No. 2668. In brief, Rule 803(8)(C) authorizes the admission of documents that would otherwise be hearsay where they qualify as "reports ... of ... public agencies ... setting forth ... factual findings resulting from an investigation made pursuant to law." This rule reaches only documents setting forth actual conclusions of a government agency resulting from an investigation as opposed to mere compilations of data or opinions of others. *McCormick on Evidence*, § 296 (6th ed. 2006). Similarly, it reaches only the final conclusions of the agency, not drafts, preliminary, or interim documents. *Id.* This exception to the hearsay rule also absolves only the hearsay of the document itself. It does not extend to hearsay-within-hearsay. *Weinstein's Federal Evidence* § 803.10[1] & [3][a] (2009)); *United States v. Chu Kong Yin*, 935 F.2d 990, 999 (9th Cir. 1991); *Heary Bros. Lightning v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1076 (D. Ariz. 2003). Thus, to the extent that the author repeated the out-of-court statement or conclusion of another, that further hearsay must also come within a hearsay exception to be admissible. *Weinstein's Federal Evidence* § 803.10[1] & [3][a]; *Chu Kong Yin*, 935 F.2d at 999; *Heary Bros.*, 287 F. Supp. 2d at 1076.

Moreover, Rule 803(8)(C) prohibits the admission of such "public records" where "the sources of information or other circumstances indicate lack of trustworthiness." FRE 803(8)(C). Whether the contents of a report are "trustworthy[]" depends on (i) the timeliness of the study, (ii) the special skill or experience of the official(s) who authored the report, (iii) whether the party against whom the report is offered had any opportunity to comment or cross examine the report, and (iv) whether the preparing agency had any bias or other adverse motivation at the time the report was prepared. *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (10th Cir.

1981); *Ram v. N.M. Dep't of Env't*, 2006 U.S. Dist. LEXIS 95353, at \*5-6 (D.N.M. Dec. 11, 2006).

Under these principles, a party cannot escape its obligation to produce admissible, non-hearsay evidence subject to cross-examination by having a government official reduce the otherwise inadmissible out-of-court statements into a government report and then seeking admission of this “public document” in lieu of live testimony from the author. Rather, these rules “require[] the [district] court to make a determination as to whether the report, *or any portion thereof*, is sufficiently trustworthy to be admitted.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (emphasis added). “As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court’s sound exercise of discretion in determining whether the hearsay document offered in evidence has sufficient independent indicia of reliability to justify its admission.” *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981).

### **DISCUSSION**

Defendants move only specific portions of State’s eExhibit 3351 that fail to comply with these rules. In State’s Exhibit 3351 (attached as Exhibit A), Defendants object to the admission of the discussions on pages 31-32 (“Water Quality Problems,” “Eutrophication,” and “Potential Pollution Sources”), 39-41 (“Legal and institutional concerns”) and 42-43 (“Developments”). *See* Exhibit A. These sections contains multiple levels of classic hearsay, recite data and analysis from varied and undisclosed sources, and tender unsubstantiated opinions based thereupon. Moreover, there is no evidence that these statements were ever subject to formal process that would have allowed any Defendant to comment on these statements.

First, these discussions are improper expert hearsay. For example, these pages of the Cooperative Report list a number of “potential sources” of point- and nonpoint- source pollution

in the IRW and discusses various opinions about how to address this pollution. *Id.* at 31-32, 39-41 & 42-43. This discussion explains various human activities in the IRW, and offers scientific conclusions on how these activities may impact the watershed. But the report cites neither data, methodology, nor sources for the opinions expressed. Rather, the report merely appends a long list of other reports, magazine articles, sport and tour guides, and other publications that provided the necessary information. *See id.* at 57-58. Aside from the hearsay nature of this discussion, this is expert opinion given without foundation or methodology.

Second, these discussions are not the final factual findings of an agency properly admissible under Rule 803(8)(C), but rather are data compilations and statements of possibilities. For example, the Cooperative Report does not conclude that water quality *has* negatively impacted life along the river, but rather that “[c]oncerns about water quality problems ... *may* have already had a negative impact.” *Id.* at 31 (emphasis added). Similarly, rather than identify scientifically-proved sources of pollution, the Cooperative Report theorizes as to “numerous *potential* sources of point and nonpoint source pollution.” *Id.* (emphasis added). With regard specifically to the poultry industry, far from reaching any factual conclusions, the Cooperative Report states that some water quality issues “*appear to be*” related to poultry operations. *Id.* at 32 (emphasis added). These statements are not definitive agency factual findings but rather are conclusory, suppositional, and ambiguous at best. Such statements do not constitute “factual findings” of an agency’s investigation, as required by Rule 803(8). *See Weinstein*, § 803.10[1], [3][a], & [4] (preparer of report must have personal knowledge of facts stated therein); The Tenth Circuit has also made clear that Rule 803(8)(C) does not apply to mere accumulations of information that are not “factual findings” of an agency or to drafts of agency documents. *Figures v. Board of Public Utilities of City of Kansas City*, 967 F.2d 357 (10th Cir. 1992) (accumulations of information that do not reach final conclusions are not “factual findings”

within the meaning of Rule 803(C)); *Brown v. Sierra Nevada Mem. Miners Hosp.*, 849 F.2d 1186, 1189-90 (9th Cir. 1988) (noting that draft documents and accumulations of information undercut the rationale behind Rule 803(8), which is that the agency conducted its own investigation and reached findings); 2 *McCormick on Evidence*, § 296 (6th ed. 2006) (“the statement must constitute the conclusion of a government agency as opposed to a mere accumulation of information, and it must not be an interim or preliminary document.”).

### CONCLUSION

For the foregoing reasons, Defendants move for the exclusion of pages 31-32 (“Water Quality Problems,” “Eutrophication,” and “Potential Pollution Sources”), 39-41 (“Legal and institutional concerns”) and 42-43 (“Developments”) of State’s exhibit 3351.

Respectfully submitted,

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